Helen D. Fauntleroy; Clementine H. Rasberry; Jane D. Trahan v. U.S. General Accounting Office

Docket Nos. 46-701-15-84; 47-701-15-84; 48-701-15-84

Date of Decision: September 25, 1987

Cite as: Fauntleroy, *et al.* v. GAO (9/25/87)

Before: James, Presiding Member

Standard of Proof

Disparate Impact

Race Discrimination

Promotion

Decision of Presiding Member On Petition For Review

This matter is before me pursuant to three Petitions For Review filed by Petitioners Helen D. Fauntleroy, Jane D. Trahan and Clementine H. Rasberry, in accordance with the provisions of 4 CFR §28.19(a). In the Petitions For Review, Petitioners allege that they were discriminated against by Respondent, the United States General Accounting Office, because of their race (e.g. Black) when they were not selected or certified as "best qualified" candidates for the positions of Evaluator, grades GS-14 and 15 respectively, under Respondent's promotion plan, known as the Merit Selection Plan ("MSP"). Specifically, Petitioners allege that they were discriminated against on the basis of their race when they were not selected to be ranked among the "best qualified" employees for consideration of promotion in 1983.

Pursuant to the provisions of 4 CFR, a hearing on the Petitions For Review was held on December 8, 9, 10 and 12, 1986, during which Petitioners and Respondent were permitted to call witnesses and present evidence in support of their respective positions.

Findings of Relevant Facts

The three Petitioners are black females employed by Respondent as GS-13 and 14 Evaluators. Petitioner Helen D. Fauntleroy is a GS-13 Evaluator currently assigned to the General Government Division of Respondent. Ms. Fauntleroy has been employed by Respondent for fifteen (15) years and she received her last promotion in 1978. Petitioner Jane D. Trahan is a GS-14 Evaluator in the National Security and International Affairs Division of Respondent. Ms. Trahan has been employed by Respondent for seventeen (17) years and she received her last promotion in 1976. Petitioner Clementine H. Rasberry is a GS-13 Evaluator in the National Security and International Affairs Division of Respondent. Ms. Rasberry has been employed by Respondent since 1967 and it is not clear when she was last promoted. At the time of the events and actions which gave birth to Petitioners' Petitions For Review (i.e. in the summer of 1983), the three Petitioners were assigned to the Federal Personnel and Compensation Division of Respondent.[1] The quintessence of Petitioners' claim of discrimination was called into being when Respondent dismantled a system it used for employee promotion known as the Competitive Selection Process. In its

place, Respondent installed, in 1983, a new employee promotion system known as the Merit Selection Plan ("MSP"). The relevant time period covered by Petitioners' complaints of discrimination is the period immediately surrounding Respondent's initial implementation of its Merit Selection Plan. In fact, the non-selections about which Petitioners complain are the first time Respondent used its Merit Selection Plan.

Just as a significant number of employees hired by the United States Department of Justice or the National Weather Service of the National Oceanic and Atmospheric Administration are of one profession or occupation (i.e. attorneys, Meteorologist, etc.), a large number of employees hired and promoted by Respondent are Evaluators or hold Evaluator related positions. Entry level positions for Evaluators hired by Respondent start at GS-7 and there appears to be ease of progress or promotion to grade GS-12. Above grade GS-12, employees compete for promotions. Until 1983 Respondent used the Competitive Selection Process for all promotions, and in 1983 Respondent installed the Merit Selection Plan.[2]

The most obvious differences in the Merit Selection Plan and the Competitive Selection Process promotion systems appears to be in the number of selections and the method of selecting the "best qualified" candidates used by each system. Under the Competitive Selection Process system, Respondent continuously or throughout the year advertised, selected and promoted employees as positions became vacant or the need arose. As a result, Respondent's employees were continuously completing and submitting applications for positions throughout the agency and Respondent's managers were continuously selecting and impaneling selection committees.

To the contrary, under the Merit Selection Plan, Respondent implemented a promotion system which established a single or an annual promotion time for all Evaluator and Evaluator related positions at grades GS-13, 14 and 15. Under the Merit Selection Plan, Respondent first performs what it called an "annual needs assessment" under which Respondent determined the number of promotion opportunities it would have available during the year based upon its budget and the work to be performed.[3]

Initially, each of Respondent's unit heads was responsible for assessing how many people were in each unit, what kinds of work the unit would most likely be involved in during the coming year, what types of roles would be performed and how those roles would be translated into grades, positions and consequently promotion opportunities. The information generated by the unit heads was passed to a committee, consisting of Respondent's top management officials, known as the Needs Determination Committee.[4] Upon receipt of the information from the heads of units, the Needs Determination Committee, upon review, approved the number of positions and promotion opportunities that would exist in each unit at each grade level during the coming year.

Thus, Respondent under its Merit Selection Plan in 1983 had, for each unit, a fixed number of promotion opportunities for the Evaluator and Evaluator related positions in grades GS-13, 14 and 15. For example, in the cases before me, the Needs Determination Committee determined and approved for the Federal Personnel and Compensation Division in 1983, three promotion opportunities for grade GS-14 and three for grade GS-15.[5] The three promotion opportunities for grade GS-14, serve as the basis for the Petitions For Review filed by Petitioners Helen D. Fauntleroy and Jane H. Rasberry and the three GS-15 promotion opportunities are the basis of Petitioner Jane D. Trahan's Petition For Review.

After the determination was made as to how many positions would be filled or available for promotion, Respondent under its Merit Selection Plan, established a management review panel to review the application of all qualified candidates, rate and rank the candidates and to recommend to a selecting official the candidates the panel believed were "best qualified" for promotion. A panel was established for each grade level (e.g. 13, 14 and 15). According to Respondent, the panel was made up of individuals who were subject matter experts familiar with the requirements and functions of Evaluator and Evaluator related positions. Each member of the panel had to hold a position high enough within Respondent that they could get a sense of the qualifications of an Evaluator and Evaluator related position and they had to possess one grade higher than the level of the employees the panel was impaneled to assess. Finally, each member of the panel had to be selected or appointed to serve on the panel by the head of a unit.

The task of the panel, at first thought, appears very simple: review all applications and determine the "best qualified" candidates. However, this is the most difficult aspect of the Merit Selection Plan process because there is no fool proof method to review paper qualifications of individuals who appear to be equally qualified candidates and to determine which of those candidates is the "best qualified" candidate. To assist the panel in its deliberation, each panel member received a promotion package, which contained an annual assessment or summary of the assignments and work completed by the employee during a specified period of time; an overall narrative assessment of performance and accomplishments; an employee performance appraisal for a specified period of time (e.g. end-of-assignment/period performance appraisal); and an employee profile or resume type document prepared by the employee which included the employee's work experience, education, training, outside activity and awards.

The panel which considered the three Petitioners consisted of five members, the Deputy Division Director for the Federal Personnel and Compensation Division; the Associate Director, Civilian Personnel; the Associate Director, Military Personnel; Deputy Associate Director, Civilian Personnel; and the Deputy Associate Director, Military Personnel. The panel considered for the three positions of GS-14, nineteen (19) applicants and recommended three as "best qualified". Ms. Fauntleroy and Ms. Rasberry were among the nineteen (19) employees considered, but were not among the three (3) employees recommended by the panel as "best qualified." Of the nineteen (19) employees considered by the panel, Ms. Fauntleroy was ranked seventh (7) and Ms. Rasberry was ranked thirteenth (13th). For the three (3) GS-15 positions, the panel considered nineteen (19) employees and recommended three as "best qualified". Ms. Trahan was not ranked among the three employees the panel recommended as "best qualified." Ms. Trahan was ranked ninth (9th).

Petitioners argue that the training the panel members received on how to determine the "best qualified" candidates was either not sufficient or inappropriate under the circumstances of this case. Petitioners base their argument on the fact that the panel members were not given specific instructions on how to compare the applications and determine who was best qualified. Each panel appears to have been left to its own devices to determine how to rate and rank candidates as "best qualified." Specifically, Petitioners argue that while the panel members received training and were advised of the information they should base their evaluation upon, (e.g. the employee profile, end-of-assignment/period performance appraisal, narrative assessment of performance and accomplishment, etc.), they were not told how to interpret the information and determine the "best qualified" candidates.[6] Hence, Petitioners' claim of discrimination centers around their claim that Respondent's selection process was overly subjective and thereby permitted discrimination against them.

Legal Analysis

Petitioners allege that Respondent has treated them differently than it treated other employees and that the basis of the difference in treatment is race. Specifically, Petitioners allege that they were not ranked among the "best qualified" applicants for the positions of Evaluators GS-14 and GS-15 because they are Black. Petitioners assert their claim of discrimination under two separate theories of discrimination, disparate treatment and disparate impact. It is well known that Petitioners may pursue a claim of discrimination under either a disparate treatment, a disparate impact analysis or both. In general, either theory may be applicable to a particular set of facts. International Brotherhood of Teamsters v. United States, 431 U.S. 333 (1971); Regner v. City of Chicago, 40 EPD ¶ 36,250 (7th Cir., 1986). However, regardless of which theory of discrimination Petitioners choose to pursue, in order to prevail, Petitioners must first establish a prima facie case of discrimination. McDonnell Douglas Corp., v. Green 411 U.S. 792 (1973). The initial creation of the prima facie case by the Petitioners is important to the case because it eliminates the most common nondiscriminatory reasons for Petitioners' nonselection. Furnco Construction Co. v. Waters, 438 U.S. 567, 577 (1978); International Brotherhood of Teamsters v. United States, supra. The prima facie case also creates a presumption that Respondent unlawfully discriminated against Petitioners. McDonnell Douglas Corp., supra. Petitioners' burden in establishing a prima facie case is not an inflexible or onerous burden. McDonnell Douglas Corp., supra; Brown v. ParkerHannafin Corp., 35 EPD ¶ 34,739 (10th Cir., 1984). The system of analysis set forth in McDonnell Douglas Corp. was never intended to be rigid, mechanized, or ritualistic. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983). Petitioners need only produce objective facts from which an inference of discrimination can be made.

While the burden of proof Petitioners must meet in order to establish their prima facie case is not onerous, their burden of proof is different for the disparate treatment theory and the disparate impact theory of discrimination. To prevail under a claim of disparate treatment, it is essential that Petitioners present proof of discriminatory motive or intent to discriminate during their case in chief. International Brotherhood of Teamsters v. United States, supra, at 324, 335-36 Winfield et al. v. St. Joe Paper Company et al., 39 EPD ¶35,580. This does not mean that Petitioners must produce direct evidence of overt or subjective racism. United States Postal Service Board of Governors v. Aikens. Petitioners need only establish by a preponderance of the evidence presented that racial discrimination was Respondent's standard operating procedure, the regular, rather than the unusual practice of Respondent. International Brotherhood of Teamsters v. United States, at 336.

To establish a case of discrimination under a claim of disparate treatment in promotions, Petitioners must show that they belong to a protected group, that they were qualified for and applied for promotion, that they were considered for and denied promotion and that other employees of similar qualifications who were not members of Petitioners' protected group were indeed promoted at the time Petitioners' request for promotion was denied. Valentino v. United States Postal Service, 674 F.2d 56 (D.C. Cir. 1982).

Once Petitioners have established a prima facie case of discrimination, the burden of proof shifts to Respondent to articulate a legitimate, nondiscriminatory reason for Petitioners' non-selection. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 257 (1981); McDonnell Douglas, supra. Respondent need only produce evidence of a legitimate, nondiscriminatory reason for not selecting Petitioners. Burdine supra; Board of Trustees v. Sweeney, 439 U.S. 24, 25 (1978). Respondent must present with clarity and reasonable specificity a legitimate, nondiscriminatory reason for the non-selection and non-promotion of Petitioners. Id. at 254-56, 258, 101 S.Ct. at 1094-1095, 1096. To satisfy this

"intermediate burden," Respondent is not required to convince me that the promotion panel, in fact chose the better applicants for recommendation as "best qualified." Id. at 258-59, 101 S.Ct. 1096-1097. However, Respondent is obliged to produce evidence "which would allow me to rationally conclude that its employment decision had not been motivated by discriminatory animus." Id. at 257, 101 S.Ct. at 1095-1096; See, St. Peter v. Secretary of the Army, 659 F.2d 1133, 1139 (D.C. Cir. 1981) (Mikva, J., concurring in the result).

On the other hand, Petitioners in order to prevail on a claim of disparate impact discrimination need not show an intent to discriminate. Regner v. City of Chicago, supra. To establish a prima facie case of disparate impact discrimination Petitioners need .only show by a preponderance of the evidence that Respondent had a facially neutral selection standard or employment practice which had a significantly discriminatory or adverse impact on Blacks. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Kilgo v. Bowman Transportation, Inc., 789 F.2d 859 (11th Cir., 1986); Regner v. City of Chicago, supra. The standards for success under a disparate impact theory are more rigorous than those under a disparate treatment analysis. Id. To ultimately prevail in a disparate impact case, a Petitioner must not merely prove circumstances raising an inference of discriminatory impact [but] must prove the discriminatory impact at issue. Regner v. City of Chicago, supra; Love v. Monkovia 775 F.2d 998, 1004 (9th Cir., 1985).

After Petitioners establish their prima facie case of discriminatory impact, the burden of persuasion shifts to Respondent to rebut Petitioners' statistics or to show that the allegedly discriminatory practice is mandated by business necessity. Connecticut v. Teal 457 U.S. 440, 446-17 (1982); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) Kilgo v. Bowman, supra or that its employment practice has a manifest relation to the employment practice in question (e.g. business necessity) in order to avoid a finding of discrimination. Even if Respondent can demonstrate a business necessity, Petitioners may still prevail by showing that Respondent was using the employment practice in question as a mere pretext for discrimination or that other selection devices or employment practice, without a significant discriminatory effect would also serve Respondent's legitimate interest in an efficient, trustworthy and workmanship like manner. Albermarle Paper Co. v. Moody 422 U.S. 405, 425 (1977), Regner v. City of Chicago, supra.

Findings

It is my finding that, while I have great difficulty with the subjective nature of the system of selection for promotion used by Respondent in 1983 (e.g. the Merit Selection Process), I do not find that Petitioners were discriminated against when they were not certified as "best qualified" by the selection panel and even if they could prove that they were discriminated against, they failed to establish that they would have been promoted, but for Respondent's discrimination. Petitioners merely proved that Respondent's Merit Selection Plan is a subjective selection procedure which could (but not proven in this case) be discriminatory.

In spite of evidence presented by Respondent to the contrary, there is ample evidence in the record which shows that the three (3) Petitioners were well qualified for promotion to GS-14 and 15, respectfully. Respondent's argument to the contrary is little more than a tongue and cheek argument advanced to support its reasoning for not selecting Petitioners as "best qualified." I also find that the six individuals selected by Respondent as "best qualified" were also well qualified.[7]

Further, there is no doubt that Petitioners belong to a protected group (e.g. they are Black females). Likewise, there is no doubt that Petitioners applied for and were considered for selection among the three "best qualified" employees for promotion to grades GS-14 and GS-15.[8] However, Petitioners' prima facie case starts to unravel and falls at that point, because Petitioners were unable to demonstrate that they would have been promoted, even if they could later prove discriminatory conduct on the part of Respondent in its selection process. Petitioners do not dispute the fact that Respondent's Needs Assessment Committee designated or set aside three positions at the GS-14 level, and three at the GS-15 level in the Federal Personnel and Compensation Division, and Respondent's promotion panel reviewed the promotion packages of eligible candidates and recommended three individuals for promotion to GS-14 and three for promotion to GS-15. However, Respondent did not promote any of the employees designated as "best qualified" to any of the six positions it made available in the Federal Personnel and Compensation Division. Petitioners further concede that none of the individuals designated by the selection panel as "best qualified" were promoted. Respondent's decision not to fill the six positions in the Federal Personnel and Compensation Division does not appear to be related to Petitioners and Petitioners do not argue that the decision relates to them. Instead, Petitioners argue that even though there were no promotions made in the Federal Personnel and Compensation Division, had they been designated as "best qualified" they could have taken their papers to other divisions and requested consideration. Petitioners cite the National Security and International Affairs Division as an example of a Division where they would have taken their rating of "best qualified" had they received one. Petitioners, therefore, request as relief, promotion of two grades (i.e. Promotion of Petitioners Helen D. Fauntleroy and Clementine H. Rasberry to GS-15 and Petitioner Jane D. Trahan to the Senior Executive Service). This request, however, in no way conforms to the facts of this case. When I consider the facts of the case in the light most favorable to the Petitioners, I am persuaded that they each lost, if anything, nothing more than a mathematical or theoretical chance to be considered for promotion. But, even that chance, when viewed in the totality of the surrounding facts of this case, may not be granted by me when the positions Petitioners claim to have been denied, because of Respondent's discriminatory conduct, went unfilled and the individuals Petitioners allege Respondent's discriminatory conduct favored, received nothing. This is especially true where the decision not to fill the positions were not, in any way, related to Petitioners but was apparently caused by Respondent's decision to abolish the Division. As a result, I questioned whether Petitioners have satisfied their last requirement of the prima facie case, as set forth in McDonnell Douglas Corp.

However, while I have doubts about Petitioners' prima facie case, I do find that in this case the loss of a mathematical or theoretical chance for promotion does fall within the minimal requirements set forth in McDonnell Douglas Corp. for a prima facie case.

Next, I must analyze Petitioners' prima facie case under the disparate treatment and disparate impact theories of discrimination. To establish their prima facie case of discrimination under the claim of disparate treatment and meet their ultimate burden of proving intentional discrimination by Respondent, Petitioners have advanced their claim from behind a sword consisting of statistical and anecdotal evidence shielded by evidence of the subjective nature of Respondent's promotion system. It is well settled that a prima facie case of disparate treatment may be established by statistical evidence alone, if the statistics are sufficiently compelling or tend to show gross disparities. Teamsters v. United States, supra; Bazemore v. Friday, 751 F.2d 662, 689, 690 (4th Cir. 1984); Griffin v. Carlin, 755 F.2d 1516, 1525 (11th Cir. 1985). The prima facie case created by statistics will be enhanced if anecdotal evidence is offered to bring the cold numbers convincingly to life. International Brotherhood of Teamsters, supra, Kilgo v. Bowman Transport, 29 EPD ¶ 32,820 (451, U.S. 440, 1982), Winfield v. St. Joe Paper Co., 38 EPD ¶ 35,580.

The statistics provided by Petitioners, in this case, when viewed in total and under the guidelines set forth in the Uniform Guidelines on Employee Selection Procedures are most troubling because the statistics, standing alone, are significant enough to permit me to draw an inference or conclusion that Respondent's overall promotion system, as operated in 1983, did tend to have an adverse impact on the promotion potential of Blacks. Adverse impact is shown if the figures produced by Petitioners reflect a significant discrimination impact. Connecticut v. Teal, supra. Petitioners' statistics need not proved disproportionate impact with complete mathematical certainty, Jordan v. Wilson, 42 FEP cases 950 (M.D. Al. 1986) and there is no set mathematical threshold that must be met. Id. Petitioners merely need to establish disparate impact by a preponderance of the evidence, that is, it is more likely than not that such impact exists. Id. In this case, White employees of Respondent appear to have been selected, in 1983, agency wide, at a rate 51% higher than the rate of Black employee selection.

Total Number of Total Number of Employees Rated	Eligible Employee Best Qualified Selection Ratio	By Race Agency Wide By Race Agency Wide By Race Agency Wide
White 1380	342	24.78%
Black 194	25	12.88%

Therefore, as testified to by Petitioners' expert, there does appear to be statistical disparity between the overall agency percentage of Blacks recommended as "best qualified" and the overall agency percentage of Whites recommended as "best qualified" under Respondent's promotion system in 1983. The disparity or percentage of differences in the recommendations appear to be significant and something beside chance alone may explain the difference. Race may be one explanation, where the selection rate for Blacks is about 51% of the rate of their White counterparts. However, Petitioners' inference of discrimination must be evaluated in light of all the surrounding facts and circumstances of this case. Kilgo v. Bowman Transport, supra. The usefulness of Petitioners' statistics depends upon all the surrounding facts and circumstances. Supra. Even Petitioners' expert suggested that there was more to the disparity than what meets the eye, when he testified that there were factors other than race which could explain the disparity in the statistics. But, neither Petitioners nor Respondent chose to eliminate any of the other possible factors. To prove meaningful, Petitioners' statistics should have taken into consideration or eliminated other possible factors which impact upon Respondent's selection process.[9] Without the elimination of other factors, Petitioners' statistics are not completely useful.

One fact which I cannot overlook is the failure of Petitioners' statistics to address the question of whether adverse impact exists in the selections made in the Federal Personnel and Compensation Division. While Petitioner's statistics suggest an inference of discrimination against Blacks in Respondent's entire agency, the same statistics may or may not suggest significant adverse impact in the selection ratio for Blacks verses that for White employees in the Federal Personnel and Compensation Division.[10] Therefore, while other Blacks may have been discriminated against, Petitioners' inference of discrimination may or may not hold true for the Federal Personnel and Compensation Division. Petitioners' statistics do not provide enough information.

Hence, because Petitioners' statistical evidence is insufficient to bolster their claim of disparate treatment, it therefore, becomes necessary to review Petitioners' anecdotal evidence to determine whether it provides support for Petitioners' claim. Petitioners' anecdotal evidence falls into two categories. One category consists of Petitioners' testimony about their belief that they had been discriminated against because

neither the panel members nor Petitioners' supervisors could explain to Petitioners why they were not rated among the "best qualified" candidates. Petitioners testified that they contacted various panel members and in some cases their supervisors to ascertain why they were not rated among the "best qualified" candidates and those individuals could not explain why they were not selected to be among the "best qualified" candidates.[11] In response, each of the panel members gave creditable testimony that they were instructed by the individuals who trained them to avoid career and performance counselling of employees when they sought information (i.e., feedback) about their ranking or standing. The testimony of the panel members was confirmed by Respondent's Personnel Management Specialist who had general responsibility for providing training to the panel members. The testimony of the panel members and Respondent's Personnel Management Specialist was not challenged by Petitioners. Also, unless Petitioners' supervisors were members of the selection panels, it seems reasonable that their supervisors would not be privy to the reasoning of the selection panel and would, therefore, be in no position to explain the actions of the selection panel.

The second category of anecdotal evidence presented by Petitioners is testimony by Petitioners that they believe that they were discriminated against because members of the selection panel had prior knowledge of them and could have used that prior knowledge in a discriminatory manner against them. When questioned about the basis of their belief or whether they had knowledge of panel members using their prior knowledge of Petitioners in a discriminatory manner, each of the Petitioners testified that they had no such knowledge. It was merely Petitioner's belief that such information may have been used and certain members of the committee should have recused themselves from participation on the selection panels. Prior knowledge standing alone or the failure to recuse oneself from participation in a selection process does not, in and of itself, amount to discrimination based upon race.

The last category of anecdotal evidence presented by Petitioners consists of testimony by Petitioners of prior direct contact between Petitioners and several panel members.[12] Again, a review of the circumstances of the contact between Petitioners and the panel members seems reasonable under the circumstances and does not appear to suggest a discriminatory animus based upon race. Prior work experience knowledge of Petitioners by the panel member does not amount to discrimination.

Disparate Impact

Although Respondent argues to the contrary, I find that Petitioners may raise a claim of disparate impact under the facts of this case. The fact that Respondent's promotion system operates in a subjective manner does not provide a shield for Respondent from claims of discrimination based upon a theory of disparate impact. Hill v. Seaboard Coast Line Railroad Company, 38 EPD ¶ 35,526. I could foresee circumstances under which failure of Respondent to establish fixed or reasonable objective standards and procedures for promotion could, in some circumstance, combined with compelling statistical and anecdotal evidence to form a discriminatory employment practice. Watson v. National Lines Service, 30 EPD ¶ 33,050, Carmichael v. Barmingher Show Works, 35 EPD ¶ 34,587, Winfield v. St. Joe Paper Co. 38 EPD ¶ 35,580. On the other hand, subjective criteria are not discriminatory per se. Hill v. Seaboard Coast Line R.R. Co. supra. Both disparate treatment and disparate impact theories of discrimination are but two analytical tools which may be used in appropriate Title VII cases to resolve the ultimate question of whether there has been impermissible discrimination. Goodman v. Lakers Steel Co., 777 F.2d 113, 130 (3d Cir. 1985).

A prima facie case of disparate impact is shown by Petitioner's identification of a neutral employment practice coupled with proof of discriminatory impact on the employee's work force. Pouncy v. Prudential Insurance Company of America, 668 F.2d 795 (5th Cir. 1982). As with most claims of disparate impact, Petitioners in this case have presented statistical evidence to establish their prima facie case and Respondent's Merit Selection Process appears to be a neutral employment practice. In defense, Respondent argues that the selection device it used in 1983 (the MSP) was job related and therefore, valid. Petitioners retort is that Respondent's Merit Selection Process is devoid of validity and factually flawed and discriminatory because of excessive subjectivity and reliance upon inappropriate measurable techniques. The argument over the validity of Respondent's promotion plan centers around the failure of Respondent to provide the panels with clear objective standards to use in determining the "best qualified" candidates.

It seems clear to me that Respondent's selection systems is subjective (i.e. each panel devised its own system to determine who was "best qualified"; also, each panel member gave different weights to the same factors), and that the members of the selection panels were given no meaningful instructions on exactly how to determine which candidates were actually the "best qualified." They were left to their own device and there is no way of knowing whether the "best qualified" candidates were, in fact, selected. But, I see no basis to conclude that the selection process was rendered invalid because of the presence of subjectivity. All of the factors used by Respondent (i.e. work experience, performance rating, communication, etc.) all suggest job relatedness. Petitioners do not even argue that the factors used by Respondent are not job related. Petitioners simply argue that the whole process is overly subjective. Because the process is subjective does not make it discriminatory on the basis of race.

Thus, while Petitioners may have established a prima facie case of discrimination, they failed to meet their ultimate burden of proving discrimination. The fact that Petitioners held the requirement for promotion does not establish entitlement to a promotion. The fact that Petitioners were rated satisfactory at one grade level does not establish qualifications at the next grade level. The fact that Petitioners have held their current grade longer than other applicants does not entitle them to promotion to the next level. Finally, the fact that Petitioners' job performance evaluations indicate that they were entitled to consideration for promotion does not automatically entitle Petitioners to promotion. Faldowski v. Johnson 25 EPD ¶31,578.

Lastly, even if Petitioners had shown discrimination, Petitioners would not have been entitled to receive the redress they request. Where Petitioners prove discrimination, Respondent has an opportunity to show by a preponderance of the evidence that absent discrimination, Petitioners would not have been selected for promotion. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977); Marotta v. Usery, 629 Fed. 615, 617 (9th Cir. 1980); Day v. Matthews, 530 Fed. 1083, 1085 (D.C. Cir. 1976). Here, none of the six individuals identified as "best qualified" in the Federal Personnel and Compensation Division received a promotion as a result of their designation as "best qualified." The Division was abolished. Therefore, Petitioners are not entitled to the relief they seek.

Conclusion

For the reasons set forth above, I find that Petitioners failed to carry their ultimate burden of proof and that even if they had, they would not be entitled to the relief they seek.

Notes

1. Through a reorganization, the Federal Personnel and Compensation Division was abolished sometime in 1983 or early 1984.

2. The record is unclear as to the basis for Respondent's decision to discontinue use of the Competitive Selection Process. Petitioners assert that Respondent decided to discontinue use of the Competitive Selection Process after or during the Fogle-Mason Decision, EEOC No. 091-80-X0055.

3. Sarah Cyton, Respondent's Personnel Management Specialist, provided creditable testimony about the Needs Determination process.

4. Members of the Needs Determination Committee consisted of the Assistant Comptroller General and other top officials of Respondent.

5. The Needs Determination Committee made its determination some time prior to the summer of 1983.

6. The end-of-assignment/period performance appraisal provided an assignment description and background, assessment of results, accomplishments and period performance on job planning, data gathering and documentation, data analysis; written communication, oral communication, administrative duties, maintaining effective working relationships and an equal opportunity environment and supervision.

7. Petitioners do not assert that the six individuals designated as "best qualified" by Respondent were not qualified. Petitioners merely assert that they were as qualified or better qualified than the six individuals. My finding that Petitioners and the six individuals designated by Respondent are all qualified is based upon my review of the promotion packages reviewed by the panel. The parties appear to be arguing over who was better qualified, which is not terribly relevant in this case.

8. All employees who Respondent believed were eligible to receive a promotion were considered by the panel. There was no actual application process. Eligible employees were rated and ranked from one (1) to nineteen (19).

9. I am well aware that it was not necessarily Petitioners' burden to eliminate all other possible factors.

10. I am not unmindful of the fact that the statistical sample for the Federal Personnel and Compensation Division may be too small to be definitive.

11. Petitioners also wrote memoranda regarding their concerns about the type of feedback they did or did not receive.

12. Petitioner Trahan testified very creditably at length about comments made to her in 1981 by her supervisor Ms. Kleeman, Mr. De Carlo and Mr. McCormick. Ms. Trahan testified that Ms. Kleeman, in 1981, told her that she wanted to promote her, but needed someone who could do something right away. The comment appears to have been made during the time Petitioner was under consideration for promotion. They do not appear to be racially motivated.